In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-861

TOMMIE ANN HILDEBRAND,
Petitioner,

vs.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD; CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; and CEL-A-PAK, INC., a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT CEL-A-PAK IN OPPOSITION

RICHARD H. FOSTER,
2010 Central Tower,
703 Market Street,
San Francisco, California 94103,
Attorney for Respondent Cel-A-Pak.

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OPINIONS BELOW

The opinions below are set forth in the appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is there a case or controversy?

2. Is the action of the California Employment Development Department in denying the petitioner benefit payments for voluntarily accepting and then rejecting Saturday work against the constitutional prohibitions of *Sherbert v. Verner,* 374 U.S. 398, 10 L.Ed.2d 965?

3. Would requiring employers to grant the special privilege of Friday evening and Saturday work absences violate the establishment clause of the Constitution?

STATEMENT

The procedural history of the case is adequately set forth in the Petition. The Supreme Court, however, should be aware that the petitioner has already received her unemployment insurance benefits and under California law, as hereinafter appears, the State has no right to get them back.

The employer's reserve account, as far as respondent knows, has been charged despite the decision of the California Supreme Court which held to the contrary. Respondent has sought, without success, to have either the Attorney General's Office of the State of California or the California Employment Development Department clarify this situation. At the present time, however, the only official notice that respondent has received is that contained in the decision of the California Unemployment Insurance Appeals

Board set forth at page 92a of the appendix to the Petition.

ARGUMENT

I.

THERE IS NO CASE OR CONTROVERSY

There is no more basic rule than that the Supreme Court does not give advisory opinions on constitutional questions. In the instant case, we do not believe that there is any case or controversy.

Under California law, once the Appeals Board has made its decision, an applicant is not liable for paid benefits despite any further appeal. The California Unemployment Insurance Code provides in pertinent part as follows:

> "§ 1376. *Overpayment determination; notice.*
>
> "The Director of Employment Development shall determine the amount of the overpayment and shall notify the liable person of the basis of the overpayment determination. In the absence of fraud, misrepresentation, or willful nondisclosure, notice of the overpayment determination shall be mailed or personally served not later than one year after the close of the benefit year in which the overpayment was made."

> "§ 1379. *Recovery of overpayments; civil action; offset.*
>
> "The Director of Employment Development, subject to the provisions of this article, may do any or all of the following in the recovery of overpayments of unemployment compensation benefits:

(a) File a civil action against the liable person for the recovery of the amount of the overpayment within one year after any of the following:

(1) The mailing or personal service of the notice of overpayment determination if the person affected does not file an appeal to a referee.

(2) The mailing of the decision of the referee if the person affected does not initiate a further appeal to the appeals board.

(3) The date of the decision of the appeals board.

(b) Offset the amount of the overpayment received by the liable person against any amount of benefits to which he may become entitled under this division within any of the following periods:

(1) The current disability benefit period.

(2) The current benefit year.

(3) Any benefit year which begins during the three-year period next succeeding the date of the mailing or personal service of the notice of overpayment determination.

(4) One year from the beginning date of any disability benefit period which begins during the three-year period next succeeding the date of the mailing or personal service of the notice of overpayment determination."

"§ 1380. *No recovery if determination affirmed; when employer's experience rating account not charged.*

"No person shall be liable for the amount of benefits received where the benefits were paid pursuant to a referee's decision which affirmed an initial determination or in accordance with a final decision of the Appeals Board, regardless of any further appeal. An employer's experience rating account shall not be charged with any benefits erroneously or unlawfully paid."

As the petitioner admits on page 13 of the Petition, after the Superior Court decision in this case the Appeals Board ordered that petitioner's benefits be paid. Although the date of this decision does not appear in the appendix to the Petition, we can inform the Court that this decision was reached on July 3, 1975—over a year before resort was had to this Court.

There is, of course, no indication that any attempt has been made by the State to file any action for recovery of any alleged overpayment under Section 1379. Obviously, under the provisions of the California Unemployment Insurance Code, no recovery is possible because of the time period involved and because Section 1380 denies liability for benefits received in accordance with the final decision of the Appeals Board "regardless of any further appeal."

The petitioner is simply asking the Court for an advisory opinion telling her that she was right in her apparently religiously-motivated actions. She has already received her unemployment benefits and the State cannot recover them. If petitioner's counsel, the California Rural Legal Assistance group, or any of the agencies established under the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., have any interest in encouraging the tenets of the World Wide Church of God, it is suggested that a more appropriate method be adopted than this case. We should remind the

Court of the various remedies under Title VII of the Civil Rights Act, *supra.*

We should also advise the Court that an action was instituted in the United States District Court, Northern District of California, under that Act's provisions entitled "Tommie Ann Hildebrand, Plaintiff, v. Cel-A-Pak, a California corporation, Defendant," action No. C-74-0414 WHO, in which United States District Judge William H. Orrick held that the defendant did not violate Title VII of the Act. The time for appeal has expired in that case.

Perhaps the possibility still exists, however, that the California Rural Legal Assistance group could commence an action in the United States District Court against the State of California with respect to the State's unemployment insurance policy. However, this action, too, would in Mrs. Hildebrand's case be subject to the objection that she has received all of her benefits and since the State cannot get them back, there is no case or controversy.

The interest of petitioner in the status of Cel-A-Pak's reserve account would seem to be academic unless she intends in some way to ask the Supreme Court to punish the employer for resisting her efforts to obtain unemployment benefits. To countenance this desire would seem to us inappropriate.

The California Department of Justice has informally advised us that it intends to request this Court to accept certiorari in this case. We must advise the Court that the only formal action which was taken by the California Employment Development Depart-

ment is contained at page 92a of the appendix to the Petition. The reserve account of respondent Cel-A-Pak was charged pursuant to the order of the California Unemployment Insurance Appeals Board. Although we informed the Appeals Board of the California Supreme Court's decision and requested remedial action, we have been ignored.

Since we have not received any official or unofficial communication of the California Department of Justice's claims in this matter, we find it difficult to advise the Court with respect to the Department's position. Apparently, however, the Department of Justice is going to suggest to this Court that both the State Supreme Court and the Appeals Board were wrong in their decisions. We will not comment on the appropriateness of a State department questioning the decisions of the State judiciary before this Court. We do not understand, however, how an action can be instituted in the Supreme Court of the United States to charge Cel-A-Pak's reserve account, particularly in view of the fact that it has already been charged. If the State Department of Justice wants monies from Cel-A-Pak, it would seem appropriate to utilize the State rather than Federal Courts for this purpose.

We cannot help but observe that the Supreme Court of the State of California has already decided against the State in this respect. Furthermore, under Section 1380 of the California Unemployment Insurance Code, our reserve account was improperly charged in the first place since under the terms of that section

where there has been a final decision of the Appeals Board there is no liability regardless of any further appeal.

If this Court is as confused as we are as to the status of Cel-A-Pak's unemployment reserve account and what the State proposes to do about it, we suggest that the Court request the State of California to clarify the matter since we have tried to do so, without success.

II.

SHERBERT v. VERNER IS DISTINGUISHABLE

Petitioner's principal ground for asking this Court to accept this case is that the decision of the California Supreme Court is in conflict with *Sherbert v. Verner,* 374 U.S. 398, 10 L.Ed.2d 965. In our opinion, the *Sherbert* case is readily distinguishable from the situation here.

In *Sherbert,* the State was affirmatively insisting that the recipient of unemployment benefits should actively search for employment in establishments which had Saturday work in violation of his religious convictions. Here, no one asked Mrs. Hildebrand to go to work for Cel-A-Pak, which she knew had a six-day week including Saturday and Friday night work. She was well aware of the necessary restrictions on her religious observance when she commenced work for the 1973 season.

In the prior season, the employer had served notice, and Mrs. Hildebrand had acquiesced, that she was not

to receive any different consideration than that received by the company's other employees. We believe that the Court can take judicial notice that many, many opportunities exist for working a five-day week, not including Saturdays.

In *Sherbert,* the Unemployment Commission was insisting on pain of denial of benefits that the applicant actively seek Saturday work. Here, all that is required is that Mrs. Hildebrand seek work in other establishments which do not work on Saturdays rather than require Cel-A-Pak and its employees to give her a special privilege because of her day of religious observance.

We think the Court can take judicial notice that Friday is a day of religious observance also by followers of the Prophet Mohammed. In addition, the Buddhists have as a holy day a different day of the week. If the special privilege accorded to Mrs. Hildebrand is required by law, so also would the followers of other religions who had different requirements as to different days be entitled to special treatment.

It is obvious that requiring a schedule of work to satisfy the days of religious observance of all the many and varied religions and sects would be unreasonable and oppressive and render the employer unable to construct a workable work plan.

III.

IF THE COURT GRANTS CERTIORARI IT SHOULD CONSIDER THE ESTABLISHMENT CLAUSE

For the reasons we have heretofore advanced, we do not think certiorari is appropriate in this case. However, if the Court decides to the contrary, then we believe the Court is required to consider the impact of the establishment of religion clause of the Constitution. The Court will recall that in *Trans World Airlines, Inc. v. Hardison,* 53 L.Ed.2d 113, the establishment clause was not considered by the Court because of its construction of the civil rights statute, *supra.* However, in this case, no federal statute is involved and the question necessarily arises as to whether giving Mrs. Hildebrand the special privilege of Friday evening and Saturday work absences constitutes a special preference for her religion over the rest of the employees of Cel-A-Pak.

The Supreme Court, in holding that a Sunday closing law could be upheld, indicated that a Sunday closing day is not to aid religion but only to set aside a day of rest—a legitimate secular end. *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393. Here, no one contends that the special privilege of Saturday absence serves any secular end other than to encourage Mrs. Hildebrand and her co-religionists in the observance of their religion. *See, also, Everson v. Board of Education,* 330 U.S. 1 at 15; *School District v. Schempp,* 374 U.S. 203, 10 L.Ed.2d 844. In *Schempp,* it was conceded that government preference of one religion over another was prima facie violation of the establishment clause. Here, by allowing those who

adhere to the World Church of God a four and one-half rather than a six-day week, the State would actually encourage this church by its creation of special privilege.

We are not prepared to say that a reasonable accommodation to the religious needs of employees may not in some instances be permitted by the establishment clause. One or two or possibly even more days a year allowed for religious reasons does not particularly trouble us. However, in this case, Mrs. Hildebrand is asking for up to 25 percent of the work week. The Court will note that her religious observance extends from 5 o'clock p.m., Friday, to 5 o'clock p.m., Saturday. Since the harvest sometimes necessitates Friday night work, this would constitute about one and one-half days of work out of the week. *Compare Trans World Airlines, Inc. v. Hardison, supra.*

The encouragement of this special privilege by the State seems to us obviously to be an active advancement of a particular religion, which is forbidden by the Constitution. However, even more important, we cannot see that the denial of a special privilege not accorded to other employees can in any way be a denial of religious liberty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD H. FOSTER,
2010 Central Tower,
703 Market Street,
San Francisco, California 94103,
Telephone: (415) 982-1901,
Attorney for Respondent
Cel-A-Pak.

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